

Water Pollution Control Advisory Council (WPCAC) Meeting
February 13, 2003 9:30 a.m.-11:45 p.m.
Directors Conference Room 111 Metcalf Building

Attendees:

Council Members:

Richard Parks, Fishing Outfitters Association of MT
Barb Butler, Billings Solid Waste Division
Mike Cobb, Livestock Feeders
Don Halverson, United Association of Plumbers & Pipefitters
Roger Noble, Land and Water Consultants
Doug Parker, Hydrometrics
Donna Rise, Department of Agriculture
Don Skaar, Department of Fish, Wildlife & Parks
Jack Stults, Department of Natural Resource & Conservation (DNRC)
Robert Willems, Soil & Water Conservation District
John L. Wilson, Montana Trout Unlimited

Other Attendees:

Bob Bukantis, Department of Environmental Quality (DEQ)
Abe Horpestad, DEQ
Lynda Saul, DEQ
Bonnie Lovelace, DEQ
Robert Ray, DEQ
Chris Levine, DEQ
Art Compton, DEQ
Lou Moore, DEQ
Jim Domino, DNRC

Approval of Minutes

Chairman Richard Parks called the WPCAC meeting to order at 9:30 a.m. The minutes were approved with correction to the Missouri River Enforcement Issue regarding the section of the Missouri River between Helena and Great Falls. The selection of the chair was added to the agenda.

Selection of Council Chair

Members expressed their appreciation for the present chairman, Richard Parks, and asked if he would continue for another year. Mr. Parks agreed to do so.

Legislative Update

Art Compton passed out a listing on all water bills that have or may be introduced this session.

Art Compton said that if the Council has any questions that cannot be answered today about any of the bills, DEQ will research the answers. Drafts that have not been introduced five days prior to transmittal at the end of the month are not likely to proceed forward.

HB 89 is the departments TMDL bill. This would extend the time for TMDL schedule completion from 2007 to 2012. This proposed change would mean 8 TMDLs are due each year instead of 12 due this year, 15 due next year, and 21 the following year. DEQ feels that, once we are fully staffed, this is a manageable level to do a quality job. The bill passed out of House Natural Resources with the Majority supporting it and the Minority opposing it. Opponents from MEIC gave the perception DEQ needs to do TMDLs faster and HB 89 gets DEQ off the hook by allowing more time for TMDL completion. If HB 89 passes through Senate Natural Resources Committee, Senator Tester, the minority leader, will support the bill on the Senate floor and

Senator Tash, the architect of the original HB 546 TMDL bill, will carry it on the Senate floor. If HB 89 passes, DEQ will go to Federal District Court Judge Malloy. Since the June 2000 order requiring DEQ to complete TMDLs by 2007 affirmed the legislative schedule, we will and ask him to affirm the new legislative schedule for 2012 completion. The plaintiffs will likely oppose this change.

There are several Coal Bed Methane (CBM) bills before the session. HB 380 is in House Natural Resources and a long debate is expected prior to executive action. HB 380 requires a permit for the discharge of CBM water to a stream channel, numeric water quality standards to be in place to get a permit, and landowner consent for storing CBM water in ponds. DEQ is working to amend HB 380 to only require a MPDES permit for CBM water discharge. DEQ does not have a position on any of the CBM bills.

Bonnie Lovelace passed out copies of HB 380, HB 202, HB 545, SB 383 and HB 533.

Bonnie Lovelace said the Department asked for amendments to clarify HB 380. The bill currently refers to state waters, which includes ground water. There is an exception in the same statute exempting ground water permitting under the Oil and Gas process. There is also consideration to amend and strike out the section concerning beneficial use water rights requirements and the section containing the landowner consent.

Bob Bukantis said SB 321 involves WPCAC membership changes. This would change it from 11 members to 10 members. It eliminates several positions including the three department directorships. SB 321 proposes adding representatives for industries concerned with disposal of inorganic waste, industries concerned with disposal of organic waste, supervisor of soil and water conservation district, irrigated agriculture, production agriculture, public works or public utilities director, conservation organization, realtor or developer, licensed professional engineer and fishery biologist. SB 321 is scheduled to be heard February 19 in room 405 by the Senate Natural Resources Committee.

John Wilson said Western Environmental Trade Association (WETA) requested SB 321 to be drafted because they do not feel the composition of WPCAC meets their needs. The departments that are currently members of WPCAC are involved in numerous things the citizens are not aware of and are valuable to the council. It is also important to keep the departments in the council because it allows them to get involved in the rule making process early.

Bonnie Lovelace said HB 202 concerns the departments appeal process. EPA notified the department that DEQ needed a broader appeal procedure in the statute for water quality discharge permits. DEQ prepared a bill to address the recommended changes that went through hearing and was tabled. EPA may want DEQ to attempt this bill again in the future. Both sides felt they have an adequate route to court if needed.

HB 545 addresses the statutory fees for suction dredge operations. The fee portions of the statute are currently only addressed as caps, not as specific amounts. HB 545 lowers the fees for suction dredging to \$10 for in state and \$30 for out of state permits from \$250. The lower fee is to encourage more people to apply for permits. It is estimated that there are a few hundred cases of unpermitted suction dredging occurring now. DEQ does not have a position on this bill and may be available for informational purposes only. HB 545 includes ½ position to be subsidized by other programs to cover the predicted work increase this bill would call for.

SB 383 modifies the prohibition section of the water quality act (§75-5-605) by adding a section that exempts certain activities within a ditch or channel from requiring a permit or meeting water quality standards. These exempt activities include maintenance, repair and general up-keep of a ditch or channel. The water must meet standards once it leaves the ditch or channel.

HB 533 proposes changes to the non-degradation requirements for nitrates. This would make the non-degradation limits the same as the health standard. This will affect the types of wastewater treatment systems installed in subdivisions. If the ground water were higher than the standard, any new discharges would require treatment to prevent the nitrate levels from increasing.

Briefing on BER actions Regarding Rulemaking For Water Quality Standards: Arsenic, Trihalomethane and EC and SAR

Abe Horpestad said DEQ withdrew their request for rulemaking on arsenic until it can be determined if the new MCL EPA has set to be effective in 2006 has been adopted. The new arsenic MCL standard may be difficult and costly for several industries, including DEQ, to comply with. Trihalomethane as a part of the arsenic rule was withdrawn. There are two effective MCLs for trihalomethane, which DEQ needs to further examine.

John Wilson said he would like an update of this at the next meeting.

Abe Horpestad said BER had a public hearing on EC and SAR last month on an amended rule. DEQ will provide responses to the 35 written comments and guidance by mid March. The Board will likely approve numeric standards and will probably not adopt the non-severability language. There was some discussion on the non-degradation section. DEQ has included a section indicating CBM discharge needs to have a significance determination under the non-degradation rule. There would be conditions put on the discharge and penalties for violating those conditions. DEQ's intention is to use this in lieu of a permit to provide upfront regulatory control. If HB 380 passes and requires a permit for CBM discharge the conditions on the non-degradation rule will not be passed. It is unknown if a 401 certification would be required with a permits issued for CBM federal metals.

John Wilson asked how WPCAC's recommendations were relayed to the BER?

Bonnie Lovelace said WPCAC's recommendations to the Department are relayed to the BER verbally.

Richard Parks said in terms of WPCAC's official advice to the Department on rulemaking, BER should receive a copy of the transcript of the WPCAC's meetings.

Bob Bukantis said the Department hears WPCAC's advice and then takes this information to the Board. The question of whether WPCAC minutes should be forwarded to the Board will be brought up with DEQ upper management.

Briefing on Federal Activities: TMDL & SWANCC

Bob Bukantis said EPA issued the first TMDL guidance in 1992. From 1996-2000, EPA under the Clinton administration worked on a new set of rules. The rules were met with resistance so Congress put the rules on hold. A recently issued draft rule out for public comment would negate the Clinton rules and have EPA develop a revised set of TMDL rules. The new EPA rules are dead and the future of federal TMDL rules is uncertain. Montana has a detailed state TMDL program included in the Montana Water Quality Act due to HB 546.

Lynda Saul said Solid Waste Agency of Cooke County vs. Army Corps of Engineers (SWANCC) is a Supreme Court decision over a gravel pit filled in to become a de facto wetland with a great blue heron rookery. The Corps asserted jurisdiction over the created wetland as waters of the U.S. using the migratory bird rule and the interstate commerce clause. The question was whether the Corps could assert jurisdiction over the isolated interstate waters solely because the waters do or could serve as habitat by migratory birds. The Supreme Court in 2000 decided 5 to 4 against the Corps having jurisdiction over these types of waters as waters of the U.S. Ten days after the decision EPA and the Corps issued a joint memo narrowly defining the Clean Water Act action to these isolated, non-navigable and interstate waters with connection to migratory birds and have been silent since then. Other organizations and states have developed their own interpretations of the impacts of SWANCC. States without previous wetland protection may amend the clean water statutes or regulations, initiate a wetlands statute or offer a tax incentive program to protect these waters. There have been approximately 20 court cases on decisions interpreting the SWANCC ruling. Montana does not have a statewide wetlands inventory and cannot know how SWANCC will affect Montana. Several types of isolated wetlands that may not be covered by SWANCC are present in Montana. Montana lacks specific legislation protecting wetlands but the state water quality laws do apply to wetlands. Montana's response to SWANCC has been mostly information based. A wetland conservation strategy and an incentive based program are in place. EPA and the Corps have issued an advanced notice of rulemaking to define "waters of the U.S." and what the implications of the SWANCC decision to the nation's waters are. Several extensions have been requested because the information being requested is broad-based. This rulemaking will affect several sections of the Clean Water Act. DEQ is considering requesting an extension and debating on how to comment on this proposed rulemaking. DEQ may decide to do a wetland inventory and have a detailed response or do a watershed/case study based response. At this point, it is unlikely a wetland inventory will be completed any time soon with budget and staff limitations.

Richard Parks said an extension is in order to understand what is at stake and the interrelationships involved. The Council would like to be kept updated on this issue as it evolves.

John Wilson said it is important to ensure intermittent and ephemeral waters are protected due to their significant importance to migratory waterfowl in Montana.

2002 303(d) List Summary

Bob Bukantis said DEQ submitted the 2002 303(d) list to EPA and received approval in January 2003. Given the tremendous effort necessary to complete TMDLs DEQ tried to minimize the effort as much as practical. The 2002 List published mainly as an interactive web site.

The 2000 303(d) list was an extensive revision. DEQ applied the sufficient credible data criteria and removed approximately 500 water bodies for reassessment. The Montana Water Quality Act dictates that DEQ reassess the removed water bodies as soon as practical. For the 2002 303(d) list 86 water bodies on the reassessment list were reassessed; 55 were placed back on the 303(d) list, 12 were found to fully support the beneficial uses and removed from both lists, and 19 water bodies needed more data to make a determination. DEQ reassessed 54 water bodies from 2000 303(d) because of additional data or TMDL needs. The 2002 303(d) list adds 7 water bodies that were not previously on the list.

2003 WPCAC Meeting Schedule

There was a preference for Thursday meeting dates and the council agreed to change all meetings to Thursdays. The meetings were scheduled for May 8th, July 10th, and November 6th.

Richard Parks adjourned the meeting at 11:45 a.m.